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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: SRC 07 105 50920 Office: TEXAS SERVICE CENTER Date: JAN 0 9 2010

[redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer project services and software consulting business. It seeks to employ the beneficiary[1] permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by an ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The petition is also accompanied by an ETA 750, Part B, for the substitute beneficiary. The director determined the petitioner did not have the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also noted that the petitioner did not appear to have the ability to pay all the beneficiaries being sponsored by the petitioner. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtain lawful permanent residence, as well as for all the beneficiaries[2] sponsored by the petitioner.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

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[1] The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA Form 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

[2] The petitioner has filed both nonimmigrant and immigrant petitions.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> **Ability of prospective employer to pay wage.** Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by USCIS.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 750, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 750, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 750 was accepted on November 19, 2004. The proffered wage as stated on the ETA Form 750 is $87,000.00 per year. The ETA Form 750 states that the position requires a Master's Degree in Computers or "equiv." and two years of experience in the job offered or two years of experience in the related occupation of software engineer.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation in 2004, and a F corporation in 2005.[4] On the petition, the petitioner claimed to have been

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] IRS Form 1120F, U.S. Income Tax Return of a Foreign Corporation.

established in 2003 and to currently employ 110 workers. According to the tax returns in the record, the petitioner's fiscal year begins on April 1st and ends on March 31st of each year. On the ETA Form 750B, signed by the beneficiary on February 7, 2007, the beneficiary did claim to have worked for the petitioner.

The petitioner submitted no evidence with the petition concerning its ability to pay the proffered wage. Therefore, on February 27, 2007, the director issued a Request for Evidence (RFE) instructing the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date until 2005. The director requested the petitioner's federal tax returns, its annual reports, or audited financial statements. The director instructed the petitioner that it could submit additional evidence such as bank account records, payroll records, or profit-loss statements as well as evidence that the petitioner has paid the beneficiary a wage or salary during these years.

Additionally, the director noted that another company, [redacted] was conducting business at the same address as the petitioner. The director requested information from the petitioner concerning its relationship with [redacted]

In response to the RFE on March 8, 2007, the petitioner submitted an explanatory letter from counsel dated March 2, 2007, stating that [redacted] transferred all its employees and accounts to the petitioner on January 1, 2004; a letter from the petitioner, by its president and chief financial officer (CFO), dated March 2, 2007; the petitioner's tax returns for 2004 and 2005; an "Assignment and Assumption and Management Agreement" dated October 1, 2003, between the petitioner and Simga; as well as a [redacted]s payroll register listing its employees on two pay dates, December 15, 2003, and January 15, 2004.

The director denied the petition on March 19, 2007. The director found that although the petitioner's chief financial officer had provided a letter that the petitioner employed over 102 employees and had gross annual revenues of $8 million, the petitioner has filed other Immigrant Petitions (Form I-140) for multiple workers. The director found that the petitioner had demonstrated neither that it has the ability to pay the proffered wage to the beneficiary nor pay the proffered wages to all sponsored beneficiaries of the I-140 petitions approved since 2004.

The petitioner appealed the director's decision on April 9, 2007.

As additional evidence, the petitioner submits on appeal letters from the petitioner, by its president and CFO, dated March 2nd, 22nd and 27th, 2007; the petitioner's unaudited[5] financial statements

[5] Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the

dated March 31, 2006; the petitioner's compiled[6] financial statements dated June 30, 2003; the petitioner's accountant's cover letter accompanying the financial statements dated June 30, 2003; a list of employees whose I-140 petitions are pending dated February 20, 2007; and California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports, for all employees for the last quarter of 2006 that was accepted by the State of California.[7]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the

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ability to pay the proffered wage.

[6] On appeal, counsel submitted the petitioner's financial statements dated June 30, 2003. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

[7] Counsel suggests that the amount of the gross earnings of the petitioner and its large payroll lends credence to the petitioner's ability to pay the proffered wage. As stated intra., in *K.C.P. Food Co., Inc. v. Sava,* 623 F. Supp. 1080, (S. D. N.Y. 1985), the court held that the U.S. Citizenship and Immigration Services (USCIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Id.* at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages paid to others cannot be used to prove the ability the ability to pay the proffered wage.

petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2004 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080; *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on March 8, 2007, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2005 was the most recent return submitted. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120 stated net income (Line 28) of $11,349.00.
- In 2005, the Form 1120-F stated net income[8] of $11,594.00.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[9] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2004, the Form 1120 stated net current assets of $8,855.00.
- In 2005, the Form 1120-F stated net current assets of $10,293.00.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through its net income or net current assets.

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[8] Form 1120-F, Section 11, Line 30.

[9] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel asserts that the petitioner has submitted a letter dated March 2, 2007, from the petitioner's president and CFO stating that the petitioner employs more than 100 employees "which is acceptable evidence for the ability to pay." Counsel's assertion is misplaced. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation provides further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.)

Given the record as a whole and the petitioner's history of filing petitions, we find that USCIS need not exercise its discretion to accept the letter from the petitioner's president and CFO dated March 2, 2007. The AAO has accessed the USCIS electronic records as of November 20, 2009, and those records indicate that the petitioner has filed over 183 Form I-140 and I-129 petitions[10] with four USCIS Service Centers since 2004. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the 87 I-140 petitions, the petitioner would need to establish that it has the ability to pay 87 combined salaries. Given that the number of immigrant and nonimmigrant petitions reflects an increase of approximately 166 percent of the petitioner's workforce, we cannot rely on a letter from the president and CFO referencing the ability to pay a single unnamed beneficiary.

As we decline to rely on the president and CFO's letter, we have examined the other financial documentation submitted. The president and CFO's letter does not clearly support the petitioner's contention that it has the ability to pay the proffered wag(s) based upon its number of employees.

Counsel contends that the director never requested evidence to pay the proffered wages for other beneficiaries for which I-140 petitions are pending, and by implication, the petitioner has no burden to submit such evidence although requested by the director. Counsel's assertion is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The director instructed the petitioner to submit its annual reports, or audited financial statements, and additional evidence such as bank account records, payroll records, or profit-loss statements as well as evidence that the petitioner has paid the beneficiary a wage or salary from the priority date.

Counsel stated that the petitioner has refused, up to the date of the appeal, to submit "the payroll records and W-2 and W-3 with a list of pending I-140 [petitions]." On appeal the petitioner submitted California Employment Development Department (EDD) Form DE-6, Quarterly Wage

[10] The I-129 petitions account for approximately 96 of the total of 183 petitions. The petitioner has submitted a list of 24 pending I-140 petitions.

Reports, for all its employees for the last quarter of 2006, and unaudited or complied financial statements. Audited financial statements and annual reports would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). *See Matter of Soriano*, 19 I&N Dec. 764; *Matter of Obaigbena*, 19 I&N Dec. 533.

Counsel contends that one reason the petitioner refused to fully comply with the director's RFE was that the petitioner has "received those kind of RFE in [the] past and [the] petitioner has successfully overcome the ability to pay proffered wages to the beneficiary and other pending I-140 beneficiaries and [the petitioner has] received ... approvals[s]." USCIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Further, each petition is reviewed on a *de novo* basis upon its own merits and the record. Since counsel is merely asserting that the petitioner has submitted such evidence in the past, and has not fully complied with the director's RFE or submitted such evidence in the record , the AAO has insufficient evidence in the record to determine the truth or falsity of counsel's assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage, and the wages of other sponsored beneficiaries, from the day the ETA Form 750 was accepted for processing by the DOL and onwards.

Counsel asserts that the petitioner financial circumstances, its "healthy gross sales," its yearly revenue growth, its "zero external debt," as well as other factors, demonstrate the petitioner's ability to pay the proffered wage and wages of all sponsored beneficiaries. According to the petition, the petitioner claimed to have been established in 2003 and to currently employ 110 workers. There is no evidence in the record concerning the petitioner's business reputation or market share.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss

Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's tax returns for 2004 and 2005 stated gross receipts of $8,792,048, and $7,989,923.00 respectively. The petitioner's gross sales revenues declined nine per cent year-to-year. Therefore, the petitioner's business revenues were in a downturn. Further, total deductions were substantial in 2004 and 2005, $8,780,699.00 (Form 1120, Line 27) and $7,992,412.00 (Form 1120-F, Section II, Line 29), respectively. Officers' compensation remained at $80,000.00 per year in 2004 and 2005, and it is included in the deduction expenses already mentioned above. There is no statement in the record offering all or part of officers' compensation to pay the proffered wage(s). Therefore, the petitioner's net income is reduced in each year because of the petitioner's large expense deductions.

Nominal net incomes were generated in those two years that were less than the proffered wage, and were inadequate to pay the salaries of the 24 pending I-140 petitions according to the petitioner, or to pay the beneficiary's wage, or the salaries of the other 182 sponsored beneficiaries, according to USCIS's record of pending immigrant and non-immigrant petitions filed since 2004.

Even allowing for the imposition of the increased employee salary burden incurred as of June 1, 2004, resulting from the acquisition of [redacted] that burden would have been off-set by additional revenues from [redacted] contracts acquired on October 1, 2003. There is insufficient evidence in the record to determine the effect of the [redacted] acquisition on the petitioner's net income or net current assets, but the petitioner's finances after the acquisition were wholly inadequate to pay the proffered wages for all sponsored beneficiaries. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.